

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000734-001 DT

10/10/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

COMMITTEE FOR JUSTICE & FAIRNESS (C J THOMAS K IRVINE
F)

v.

ARIZONA SECRETARY OF STATES OFFICE COLLEEN CONNOR
(001)
KEN BENNETT (001)
AMY CHAN (001)
WILLIAM G MONTGOMERY (001)
MARICOPA COUNTY ATTORNEYS OFFICE
(001)

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Plaintiff-Appellant the Committee for Justice & Fairness asks this Court to review the Findings of Fact, Conclusions of Law, and Recommended Order of ALJ Brian Brendan Tully, dated September 23, 2011, and the Final Decision of County Attorney William G. Montgomery, dated October 17, 2011. For the following reasons, this Court reverses and vacates the Recommended Order of ALJ Tully and the Final Decision of County Attorney Montgomery.

I. FACTUAL BACKGROUND.

In the late summer of 2010, the Committee for Justice & Fairness (CJF) caused to be aired a television advertisement entitled "Protect," which noted (1) when Tom Horne (Horne) was a state legislator, he voted against tougher penalties for statutory rape and (2) when Horne was on the Arizona Board of Education, he used his vote to allow back into the classroom a teacher who had been caught viewing child pornography on a school computer, and urged viewers to "tell Superintendent Horne to protect children, not people who harm them" and gave the telephone number for Horne at his office as Superintendent of Public Instruction. On October 21, 2010, Horne filed suit in Maricopa County Superior Court seeking a TRO to enjoin CJF and local

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television stations from airing that advertisement. The court subsequently denied Horne's application for a TRO. *Horne v. Committee for Justice & Fairness*, CV 2010-053307 (Ruling, dated Oct. 27, 2010).

On October 22, 2010, Horne's election committee filed with the Arizona Secretary of State (AzSOS) a complaint alleging CFJ had engaged in express advocacy. On October 25, 2010, the AzSOS issued a Reasonable Cause Notice stating there was reasonable cause to believe CFJ violated A.R.S. §§ 16-902 & -912, and notified the Arizona Attorney General of that finding. By letter dated January 26, 2011, the Arizona Attorney General's Office requested that the Maricopa County Attorney's Office (MCAO) handle further enforcement and litigation of that matter.

On May 23, 2011, William G. Montgomery, acting through Deputy County Attorney Colleen Connor, issued an Order Requiring Compliance ordering CJF to do the following: (1) register as a political committee with the AzSOS; (2) provide notification to the AzSOS; (3) file financial reports; (4) provide financial records; (5) comply with the requirements of Arizona campaign financial laws; and (6) comply with the request for financial records. (I.R. #16, Ex. G.) CJF appealed that Order, so the MCAO forwarded that appeal to the Office of Administrative Hearings for a formal hearing.

On August 31, 2011, ALJ Brian Brendan Tully held an Administrative Hearing. On September 23, 2011, ALJ Tully issued his Decision, which contained Findings of Fact and Conclusions of Law. Among the Findings of Fact was the finding that the advertisement in question contained inaccurate information in that the teacher in question had not viewed child pornography on his classroom computer; the teacher instead had viewed adult pornography on his classroom computer. (FOF # 18.) That Decision recommended the MCAO's May 23, 2011, Order be affirmed and upheld, and that CJF be ordered to register. (I.R. #17.) On October 17, 2011, William G. Montgomery as Maricopa County Attorney issued his Final Decision accepting and adopting the Findings of Fact and Conclusions of Law and Recommended Order of ALJ Tully. (I.R. #18.) On November 21, 2011, CJF filed a Complaint for Judicial Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12-124(A) and A.R.S. § 12-905(A).

II. GENERAL STANDARDS FOR REVIEW:

The Arizona statutory authority and case law define the scope of administrative review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12-910(E).

In reviewing an administrative agency's decision, the superior court examines whether the agency's action was arbitrary, capricious, or an abuse of discretion. The

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court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

Gaveck v. Arizona St. Bd. of Podiatry Exam., 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

[I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

Croft v. Arizona St. Bd. of Dent. Exam., 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

DeGroot v. Arizona Racing Comm'n, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984). The reviewing court must view the evidence in a light most favorable to upholding the agency's decision and affirm that decision if it is supported by any reasonable interpretation of the record. *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998). While the reviewing court is not bound by the agency's conclusions of law or statutory interpretations, an agency's interpretation of statutes or regulations that it implements is entitled to great weight. *Siegel v. Arizona St. Liq. Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991); *Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998).

However, the agency's interpretation is not infallible, and courts must remain final authority on critical questions of statutory construction.

U.S. Parking Systems v. City of Phoenix, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989).

III. ISSUE: WAS THE ACTION OF THE AGENCY SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WAS IT CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Plaintiff-Appellant the Committee for Justice & Fairness (CJF) asks this Court to reverse the Recommended Order of ALJ Tully, dated September 23, 2011 (the Recommended Order), and the Final Decision of County Attorney Montgomery, dated October 17, 2011 (the Final Decision). CJF contends the Recommended Order and the Final Decision are not supported by substantial evidence, are contrary to law, are arbitrary and capricious, and are an abuse of discretion. CJF further contends the advertisement entitled "Protect" was issue-oriented speech and not "express advocacy," and thus CJF was not required to register or file financial reports. Finally, CJF contends A.R.S. §§ 16-901, -901.01, -902.01, -913, and related statutes are unconstitutional. CJF has cited authorities and presented argument in support of its position. The Arizona Secretary of State and the Maricopa County Attorney take a contrary position and have cited authorities and presented argument in support of their position. This Court finds and

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concludes the authorities and arguments presented by CJF are well-taken, and this Court adopts those authorities and arguments in support of its decision. This Court further finds and concludes CJF is entitled to its reasonable attorneys' fees and costs.

IV. CONCLUSION.

Based on the foregoing, this Court concludes (1) the Recommended Order of ALJ Tully and the Final Decision County Attorney Montgomery are not supported by substantial evidence, are contrary to law, are arbitrary and capricious, and are an abuse of discretion; (2) the advertisement entitled "Protect" was issue-oriented speech and not "express advocacy"; and (3) A.R.S. §§ 16-901, -901.01, -902.01, -913, and related statutes are unconstitutional. This Court further finds and concludes CJF is entitled to its reasonable attorneys' fees and costs.

If any party wishes to appeal this Court's Decision to the Arizona Court of Appeals, that party must do so pursuant to A.R.S. § 12-913 and Rule 9(a) of the Arizona Rules of Civil Appellate Procedure. *See Eaton v. AHCCCS*, 206 Ariz. 430, 79 P.3d 1044, ¶ 7 (Ct. App. 2003) ("The [Arizona Court of Appeals] will allow an administrative decision to stand if there is any credible evidence to support it, but, because we review the same record, we may substitute our opinion for that of the superior court." "And when consideration of the administrative decision involves the legal interpretation of a statute, this court reviews de novo the decisions reached by the administrative officer and the superior court."); *accord, Blancarte v. Arizona DOT*, 230 Ariz. 241, 282 P.3d 442, ¶ 7 (Ct. App. 2012) ("Applying a *de novo* review of the superior court's decision . . ."); *Ritland v. Arizona St. Bd. Med. Exam.*, 213 Ariz. 187, 140 P.3d 970, ¶ 7 (Ct. App. 2006) ("In reviewing the Board's decision, we are not bound by the superior court's judgment because we review the same record.").

IT IS THEREFORE ORDERED reversing and vacating the Recommended Order of ALJ Tully and the Final Decision of County Attorney Montgomery.

IT IS FURTHER ORDERED remanding this matter to County Attorney Montgomery.

IT IS FURTHER ORDERED, by **October 30, 2012**, either Marty Harper or Thomas K. Irvine, as attorneys for CJF, shall lodge with this Court a proposed Order for this Court signature.

IT IS FURTHER ORDERED, if CJF wishes this Court to order the payment of reasonable attorneys' fees and costs, CJF shall file the necessary supporting paperwork and shall provide in the proposed Order blanks for this Court to use in ordering reasonable amounts.

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